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September 19, 2012

The Honorable Manuel J. Cervantes
Administrative Law Judge
600 North Robert Street , PO Box 64620
Saint Paul, MN 55164-0620
rulecomments@state.mn.us
Fax: 651-361-7936

RE: Minnesota Pollution Control Agency Response to and Rebuttal of Comments

On July 9, 2012, the Minnesota Pollution Control Agency (Agency) published a dual notice proposing to amend existing Minnesota Rules relating to permitting air emissions. The Agency proceeded in accordance with Minnesota's Administrative Procedures Act (MS 14). The Agency proposed adopting certain changes in federal regulations promulgated by the United States Environmental Protection Agency (EPA) under the Clean Air Act (CAA). The Agency also proposed amending existing rules to clarify who must apply for air permits.

The Agency proposed amending its air permitting rules in order to maintain consistency with the federal air permitting regulations (which serve as the basis for the Agency's air permitting rules). For the reasons in the Statement of Need and Reasonableness (SONAR), the Agency sees benefit, efficiency and effectiveness in maintaining consistency of its air permitting programs with the federal programs.

The Agency hereby submits its final input to the hearing record that closes at 4:30 p.m. on September 19, 2012. With one minor exception described below, the Agency continues to support the rules as originally proposed and as supported by its notices and by its Statement of Need and Reasonableness (SONAR). The Agency understands that the Administrative Law Judge must review and determine compliance with the following conditions from Minnesota Rule ch. 1400.2100:

> *"1400.2100 STANDARDS OF REVIEW.*
> *A rule must be disapproved by the judge or chief judge if the rule:*
> *A. was not adopted in compliance with procedural requirements of this chapter, Minnesota Statutes, chapter 14, or other law or rule, unless the judge decides that the error must be disregarded under Minnesota Statutes, section 14.15, subdivision 5, or 14.26, subdivision 3, paragraph (d);*
> *B. is not rationally related to the agency's objective or the record does not demonstrate the need for or reasonableness of the rule;*
> *C. is substantially different than the proposed rule, and the agency did not follow the procedures of part 1400.2110;*
> *D. exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by, its enabling statute or other applicable law;*
> *E. is unconstitutional or illegal;*
> *F. improperly delegates the agency's powers to another agency, person, or group;*
> *G. is not a "rule" as defined in Minnesota Statutes, section 14.02, subdivision 4, or by its own terms cannot have the force and effect of law; or*

H. is subject to Minnesota Statutes, section 14.25, subdivision 2, and the notice that hearing requests have been withdrawn and written responses to it show that the withdrawal is not consistent with Minnesota Statutes, section 14.001, clauses (2), (4), and (5)."

Following, the Agency describes how it believes it complies with each review criteria above:

"1400.2100 STANDARDS OF REVIEW.
A rule must be disapproved by the judge or chief judge if the rule:

A. was not adopted in compliance with procedural requirements of this chapter, Minnesota Statutes, chapter 14, or other law or rule, unless the judge decides that the error must be disregarded under Minnesota Statutes, section 14.15, subdivision 5, or 14.26, subdivision 3, paragraph (d);"

The Agency believes that it has complied with procedural requirements of Minn. R. ch 1400 and Minn. Stat. ch 14 comprising the Administrative Procedures Act with one known error that it believes did not deprive any person of meaningful participation as described below:

Minn. R. 1400.2080, subp. 6., Timing [requires that] "…*A dual notice must be mailed at least 33 days before the end of the comment period and must be published in the State Register at least 30 days before the end of the comment period. […] Depositing a mailing in the state of Minnesota's central mail system for United States mail satisfies the mailing requirement of this subpart."*

As the Agency reported at hearing, the Agency used email in lieu of physically mailing a notice to satisfy the mailing requirement of this subpart. The Agency emailed (and published in the *State Register*) its dual notice 32 days ahead of the end of the comment period, exceeding the minimum of 30-days notice. The Agency sent its dual notice on July 9, 2012, which is 32 days before the close of its comment period on August 10, 2012, using its self-subscribing GovDelivery email system. As a result, interested persons received actual notice 32 days before the close of the comment period.

The Agency believes that the 33-day mailing deadline was established for a system using paper notices delivered by the United States Postal Service and was intended to allocate a reasonable amount of time for physical delivery of the mail. The Office of Administrative Hearing (OAH) has recognized the Agency's use of electronic notices in lieu of paper notices delivered by the U.S. Postal Service in recent prior rulemakings. The past practice of accounting for a delivery delay becomes moot when using email which provides nearly instant delivery. The Agency provided interested persons 32 days of effective notice before the end of the comment period which the Agency believes to be the critical, substantive condition of this subpart. Therefore, the Agency believes this is a harmless error because no person or entity was deprived of an opportunity to participate meaningfully in the rulemaking process.

> ***"Minnesota Statute 14.15 ADMINISTRATIVE LAW JUDGE'S REPORT.***
> *[…]*
> *Subd. 5. Harmless errors. The administrative law judge shall disregard any error or defect in the proceeding due to the agency's failure to satisfy any procedural requirement imposed by law or rule if the administrative law judge finds:*
> *(1) that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or*
> *(2) that the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process."*

The notice delivery described above did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process, and in fact the Agency provided 32-days notice rather than the minimum of 30-days. Therefore, the Agency asks the Judge to find this situation harmless error.

> ***"B. is not rationally related to the agency's objective or the record does not demonstrate the need for or reasonableness of the rule;"***

The Agency believes that the proposed rules, as revised above, are rationally related to the Agency's objective(s) as stated in the Agency's SONAR and in its dual notice, and as submitted into the hearing record. The Agency's intent, in summary, is to make its rules consistent with the EPA's air permitting regulations under the CAA, and to clarify in existing rules regarding who must apply for a permit. The Agency published its intent to make its rules consistent with those federal rules.

The first stated need is to provide a state air-permitting program that is consistent with the federal air permitting program (and other states). The EPA has delegated certain permitting functions to the Agency and the Agency must update its rules to maintain that program delegation. The Agency believes it is reasonable to meet this need by adopting the rules as proposed (along with the minor revision described below). By adopting air permitting rules that are consistent with the federal permitting program, the Agency maintains important consistency between the state and federal programs. These rules are consistent with the federal regulations.

Permit threshold and costs

Some commenters suggested that the Agency adopt a permit threshold lower than the threshold adopted by the EPA. The EPA considered a lower threshold when amending its rules. The EPA's preamble to its final Tailoring rule provided an analysis of the additional level of coverage of greenhouse gas emissions and estimated program costs at lower permit thresholds (Federal Register, June 3, 2010. Vol. 75, No. 106, page 31540, Table V-1). Elements of Table V-1 are summarized in Table A, below.

While the Agency could have chosen to make some aspects of its proposed rules more stringent than the federal rules, the Agency chose to be consistent with the EPA believing that the federal rules were promulgated with significant resources, rigor, balance of interests, and broad input that the Agency does not have the resources to fully match.

The federal effort resulted in rules that the Agency believes are comprehensive and well-informed and that provide the first in a possible series of regulatory steps that might eventually lead to additional legislation or rules that might target future reductions in greenhouse gas (GHG) emissions. The subject rules were intended to identify and quantify major sources of GHG emissions, not to dramatically reduce those emissions.

The Agency believes it is reasonable to conform to the federal major source permit threshold for GHGs of a potential-to-emit of 100,000 tons/year CO2e or more. The Agency estimated from the EPA's data that Minnesota would likely have approximately 120,000 facilities newly subject to major source permitting if the major source threshold reverted to the level that existed prior to the adoption in 2011 of the temporary rule. Requiring small sources such as residences, schools or restaurants to obtain a permit as a major source would likely result in substantial costs (see Table A), and administrative burdens to both newly-regulated small sources and to the Agency.

Minnesota's costs to administer a GHG permit program can be estimated as approximately two percent of the national figures in Table V-1 from the *Federal Register*. Two percent is a reasonable estimate as Minnesota produces slightly less than two percent of total national output, has somewhat less than two percent of the total United States population, and has somewhat more than two percent of total national personal income. For comparison to the estimated program costs in Table A, the Agency's air program's total budget is $28.6 million for FY12-13 and the Agency's total budget is $362.8 million (Agency website, financial transparency pages).

Table A. Summary of Permit Coverage

Major source threshold [tons/year CO2e]	Percent of GHG emissions covered	Estimated Minnesota costs to run GHG permit program
100,000 (MPCA proposed rules same as federal)	67%	$2.1 million
50,000	70%	$2.94 million
25,000	75%	$7.1 million
100 / 250 (same as previously-regulated pollutants)	78%	$450 million

Some commenters suggested that the Agency should charge air permit fees for GHGs. The air permit program assesses fees on actual emission of certain pollutants. The list of air pollutants that are subject to a fee assessment, otherwise known as chargeable pollutants, is provided in Minn. R. 7002.0015. The list of chargeable pollutants does not include any of the GHGs covered by this rulemaking. To change this proposed rule to institute fees for GHGs emissions would constitute a substantial difference because there has been no prior notice to the public that the Agency was proposing a change to the definition of chargeable pollutant in M.R. 7002.0015, subp. 2a. These fees are used to administer the Agency's permit program. The EPA did not set a fee for GHGs nor did it specifically require states to assess fees for GHGs under its revised rules for the operating permit program. States are required to collect fees sufficient to cover all reasonable (direct and indirect) costs to develop and administer operating permit programs. As permitting for GHGs proceeds, states will review their resource needs and determine if their existing fees are adequate. If the Agency finds its current fee structure is not adequate to cover the additional work required for GHG permitting, the Agency may chose to add a fee

for GHGs. In that case, a separate rulemaking would be undertaken. Changes to the fee structure are outside the scope of the current rulemaking.

Clarifying existing rule language
A second stated need was to clarify existing rules regarding who must apply for and be listed on air emission permits (both owners and operators). There had been some past confusion on this issue by permit applicants that resulted in the Agency mistakenly issuing some permits to an operator or an owner only when both in fact had control and oversight of the facility. The Agency believes it is necessary to provide clear language for permit applicants and that proposed rule language is reasonable to meet that need.

"C. is substantially different than the proposed rule, and the agency did not follow the procedures of part 1400.2110 Procedure to Adopt Substantially Different Rules;"

The Agency intends to adopt the rules as proposed with one minor change to extend the time by which a permittee must submit an application to amend its permit due to a change in an applicable rule. The Agency believes that the proposed change is consistent with the original intent of the rules as proposed; making the Agency's rules consistent with the federal rules. Minnesota Statute 14.05 describes what constitutes substantial changes:

"14.05 GENERAL AUTHORITY.
[…]
Subd. 2. Authority to modify proposed rule.

(a) An agency may modify a proposed rule in accordance with the procedures of the Administrative Procedure Act. However, an agency may not modify a proposed rule so that it is substantially different from the proposed rule in the notice of intent to adopt rules or notice of hearing.
(b) A modification does not make a proposed rule substantially different if:
(1) the differences are within the scope of the matter announced in the notice of intent to adopt or notice of hearing and are in character with the issues raised in that notice;
(2) the differences are a logical outgrowth of the contents of the notice of intent to adopt or notice of hearing and the comments submitted in response to the notice; and
(3) the notice of intent to adopt or notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.
(c) In determining whether the notice of intent to adopt or notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be the rule in question the following factors must be considered:
(1) the extent to which persons who will be affected by the rule should have understood that the rulemaking proceeding on which it is based could affect their interests;
(2) the extent to which the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the notice of intent to adopt or notice of hearing; and

(3) the extent to which the effects of the rule differ from the effects of the proposed rule contained in the notice of intent to adopt or notice of hearing."

Change 30-day submittal time to 120-days in part 7007.1450

The Agency believes that changes to its rules as proposed comply with 14.05, subd. 2, item (b), subitem (1), that "*the differences are within the scope of the matter announced in the notice of intent to adopt or notice of hearing and are in character with the issues raised in that notice*." The proposed rules 7007.1450, subpart 2, provided 30 days for an applicant to submit a permit application when a regulatory change makes certain activities no longer qualify as insignificant. A commenter was concerned that 30 days was an unreasonably short timeline to process the application and suggested a timeline of possibly 180 to 365 days. The Agency notes that it did not receive concerns about complying with this part under the temporary GHG rules which were promulgated on January 24, 2011. However, after deliberation, the Agency agrees that the proposed 30-day timeline is a relatively brief amount of time for a compliance due date and that this has the potential to cause compliance difficulties in the future. Therefore, the Agency proposes to change this provision to allow up to 120 days for this submittal. This is consistent with the Agency's original intent to provide sufficient time for a submittal, and with federal requirements for notifications for a similar scenario (see Code of Federal Regulations 40 CFR 63.9(b)(2)). The Agency believes that this change provides sufficient time while remaining consistent with federal rules and does not constitute a substantial change in the original intent of this provision.

"D. exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by, its enabling statute or other applicable law;"

The Agency believes that it has operated entirely within its authority to propose these rules and has complied with the procedures of the Administrative Procedures Act to adopt the rules as proposed. Minn. Stat. § 116.07, subdivision 4(a) provides the Agency with general authority in state law to make air permitting rules (see SONAR). There is no question that the adoption of a GHG threshold for air quality permitting purposes is within the Agency's authority granted in Minn. Stat. § 116.07, subd. 4(a). In this case, the Agency has chosen to propose rules that are consistent with federal rules on the same subject.

"E. is unconstitutional or illegal;"

The Agency believes the rules as proposed and revised are constitutional and legal. In addition, the Agency has not received comments regarding the constitutionality or legality of the proposed rules.

"F. improperly delegates the agency's powers to another agency, person, or group;"

The proposed rules do not delegate the Agency's powers to another agency, person or group. In addition, the Agency has not received comments that the proposed rule improperly delegates the Agency's powers.

"G. is not a "rule" as defined in Minnesota Statutes, section 14.02, subdivision 4, or by its own terms cannot have the force and effect of law; or"

The proposed rules are of future effect and general applicability, are legal and are certified by the Revisor of Statutes.

"H. is subject to Minnesota Statutes, section 14.25, subdivision 2, and the notice that hearing requests have been withdrawn and written responses to it show that the withdrawal is not consistent with Minnesota Statutes, section 14.001, clauses (2), (4), and (5)."

The proposed rules are not subject to Minnesota Statute 14.25, subd. 2, and comply with Minnesota Statutes.

Please contact me at 651-757-2290 if you have any questions.

Sincerely,

Nathan Brooks Cooley
Rule Coordinator
SSTS, Land Treatment, and Rules Section
Municipal Division

NBC:wgp

Enclosures: Response to Comments Received during Dual Notice Period
Copy of Certified Rules RD4064 showing proposed revision in 7007.1450, subp. 2